No. 87-1313

IN THE

Supreme Court of the United States

October Term, 1987

THE DAYTON POWER AND LIGHT COMPANY,
Petitioner,

vs.

THE OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code §4112.02(A), as affirmed by the Supreme Court of Ohio, and there is no federal question involved, is there any reason for the Supreme Court of the United States to review the state court's decision?

2. Where racist supervisory personnel make racially-motivated reports and recommendations to an employer regarding a black employee, and the employer's reliance on those reports and recommendations constitutes the sole basis for the resulting discharge of that employee, and the Supreme Court of Ohio holds the employer liable for that discriminatory discharge as violative of Ohio Revised Code §4112.02(A) in accordance with well-established legal principles, is there any reason for the Supreme Court of the United States to review that decision?

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STATEMENT OF THE CASE

On February 28, 1983, Samuel Prather filed an affidavit with the Ohio Civil Rights Commission ("Commission"), charging that he had been discriminatorily discharged by his former employer, the Dayton Power and Light Company ("Company"), on September 20, 1982, because of his race, Black. Following a public hearing, Chief Hearing Officer Franklin A. Martens concluded that the direct evidence of racial bias and discriminatory intent exposed at the

hearing, as well as the lack of credibility of key Company witnesses, established unlawful racial discrimination by the Company, and recommended that the Company be ordered to reinstate Mr. Prather with full back pay. On March 12, 1985, the Commission determined that reliable, probative and substantial evidence supported the finding of discrimination, and issued a Final Order to this effect incorporating the recommended remedy.

The Montgomery County Court of Common Pleas affirmed the Commission's decision, upholding the Commission's finding of racial discrimination and ruling that applicable precedent established the Company's liability for the discriminatory actions of its supervisory personnel.

Nevertheless, the Second District Court of Appeals reversed both the Commission and the Court of Common Pleas, citing only "common sense". The Court misstated key facts, and simply stated that it "disagreed" with controlling legal authority, without citing any contrary authority.

A Motion to Certify was immediately granted by the Supreme Court of Ohio. On November 10, 1987, the Supreme Court issued a *per curiam* decision, reversing the Court of Appeals and reinstating the orders of the Commission and the Court of Common Pleas. The Supreme Court noted that the record clearly revealed disparate treatment of Mr. Prather, and that the Company was liable based upon evidence that white supervisors who were involved in the "chain of command" leading to Prather's termination had admitted being racist and were shown to have engaged in racist behavior and language directed toward Mr.

Prather. In fact, one Justice found it necessary to separately observe that "the facts of this case revealing such discrimination . . . are, in a word, appalling."

Petitioner now argues that a "federal question" exists here because the Supreme Court of Ohio, in *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192 (1981), stated that "federal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of [Ohio Revised Code] Chapter 4112", and that the evidentiary standards utilized under Chapter 4112 should be similar to those utilized under Title VII. Petitioner's argument is ludicrous. This action is solely a state cause of action pursuant to Ohio law, with remedies prescribed by state law. Through *Plumbers* and earlier cases, the Supreme Court of Ohio has merely recognized that the purposes and language of Chapter 4112 are similar in many respects to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.* Accordingly, the Court has, quite logically, held that it is appropriate for Ohio Courts, in cases brought under Ohio Revised Code Chapter 4112, to look to federal case law for guidance in interpreting the state law. This, however, does not create any "federal question" here. Indeed, Petitioner's argument would mean that every decision of the Ohio Civil Rights Commission allegedly involves a "federal question" suitable for review by the Supreme Court of the United States, which is surely not the intent or meaning of U.S. Supreme Court Rule 17.

STATEMENT OF THE FACTS

Samuel Prather, a Black male, worked with the Dayton Power and Light Company from March 19, 1970, until September 13, 1982. Mr. Prather had attained the highest status in his rank, First Class Technician A. During his 12 1/2 years of service with the Company, Mr. Prather's only discipline was a one day suspension.

All seven of the other technicians on Mr. Prather's crew were White; as were his immediate supervisor, Mike Mason; another foreman with supervisory authority over Mr. Prather, Bob Hackathorn; the manager of Mr. Prather's unit, David Elkins; and the manager of the Stuart Station, Bob Ralston.

On Sunday, September 12, 1982, Mr. Prather was working with a helper and had three job assignments. When they reported to the shop to obtain materials for their second job, they heard general laughter, and were informed that some other employees had punched holes in a water hose so that when two men, Danny Dudley and Bob Hackathorn, went to use the hose, they were sprayed with water. While this hose was being repaired, foremen Mason and Hackathorn left the area, and some of the employees resumed trying to punch more holes in another piece of hose. In the midst of this activity, someone passed Mr. Prather a knife and encouraged him to cut another hole in the hose, which he did.

This kind of "horseplay" was an everyday occurrence at the Stuart Station, which never resulted in punishment or discipline of any kind. For example, White supervisors and other employees routinely engaged in various acts, some physically harmful, including dumping buckets of water on each other, busting hardhats, and wrestling and grabbing other

individuals' testicles. Mike Mason and Bob Hackathorn were involved in many such incidents. Even Station Manager Ralston admitted discharging a handgun at the worksite, and testified that he "couldn't recall" whether Company property was damaged in the process. Many of these acts of horseplay also damaged Company property, including incidents where employees would find their lockers glued or welded shut. One such employee, John Feurt, reported such an incident to management, but there was never any disciplinary action taken.

Indeed, none of the above-mentioned White participants were ever disciplined for their actions. Although Foremen Mason and Hackathorn themselves were aware of, and participated in, many of these incidents, they had *never* written up any employee for either horseplay or destruction of Company property.

On the day in question (September 12, 1982), however, Hackathorn thought he saw Prather cutting the hose and told Mason about it. The two White foremen then wrote memoranda about the incident to Unit Manager Elkins, who in turn reported it to Station Manager Ralston. Ralston instructed Elkins to investigate both of the September 12 hose cutting incidents. Pursuant to this alleged "investigation", Elkins submitted a recommendation to Ralston that Prather be discharged, based on several "conclusions": Elkins stated that the "root cause" of Mr. Prather's actions was "a basic flaw in character"; that "Mr. Prather does not see the right or wrong of damaging company property, be it in the act of horseplay or otherwise"; and that the only "effective corrective action" which would remedy Mr. Prather's "basic character flaw" would have to be termination, as any lesser discipline would not remedy that "non-trainable" flaw.

Based upon this recommendation, Prather was discharged effective September 13, 1982. Prather was notified of this action by a letter signed only by Elkins himself.

It is extremely important to note this "chain of command" involved in Mr. Prather's termination, because overwhelming evidence on the record establishes that Mason, Hackathorn, and Elkins are admitted racists and/or have exhibited racist behavior. For example, earlier in 1982 Mason told Prather that "if anybody ever got to walk (Prather's) fat black ass to the gate, (Mason) hoped he was the one to do it!", as attested to by both Prather and witness Eddie Grooms. Mason continually made racial slurs and degrading remarks about Prather in the presence of witness Frank Rosselot, a Born Again Christian, who testified that he had frequently heard Mason call Prather "a lazy Black bastard" and a "nigger". Mason also made no secret of his racism to witness John Feurt, who returned from a work-related back injury on September 14, 1982, while Mr. Prather was still on an indefinite suspension pending the alleged "investigation" of the matter. At that time, Mason informed Feurt that "we're finally rid of that lazy fuckin' nigger!"

With regard to the other employee who "reported" Mr. Prather's actions, Bob Hackathorn admitted that he was "prejudiced", but "working on it". This is confirmed by the testimony of other witnesses. In August of 1982, John Feurt heard Hackathorn admit that he was a racist but "trying to do something about it". Moreover, Danny Dudley, a Black Male, testified that as far back as 1978 he and Hackathorn had discussed Dudley's being married to a White woman. During these conversations,

Hackathorn not only stated that this interracial marriage was "wrong", but also openly admitted "several times" that he was prejudiced.

Bob Hackathorn also exhibited racist tendencies and animosity directly toward Prather. Hackathorn admitted to Prather that he had a "problem with Black people", was a "racist", and knew it. Furthermore, just two days before he was discharged, Prather was driving a truck to pick up supplies, when he saw Hackathorn along the road and, pursuant to standard company procedure, blew the horn as he approached. Hackathorn wheeled, pointed his finger at Prather, and angrily stated "all right, big boy, your day is comin' and your day is comin' soon!". This forecast proved to be correct.

Again, it is crucial to note that these two men—Mason and Hackathorn—supplied Unit Manager Elkins with the only reports of the hose cutting incident, which in turn formed the basis for Elkins' report to Station Manager Ralston. Elkins' recommendation of termination itself is filled with unsubstantiated generalizations regarding Mr. Prather's alleged "basic flaw in character" which was "not trainable," and is further set against a background of animosity as a result of other remarks which Elkins had made to Prather just one week before his discharge. Ralston, in turn, relied solely on these reports and recommendations in making an ultimate decision to discharge Prather, having never himself conducted any investigation of the incident. It was Unit Manager Elkins, not Station Manager Ralston, who signed Prather's termination letter.

Prather's termination is particularly suspect when compared with the handling of another hose-cutting incident just five months earlier. In April of 1982, four welders were working in a boiler, where two men had to

share one air hose. One man reached for the air hose of another employee, Danny Doyle, a White Male. Doyle got angry, and during an ensuing argument, Doyle cut the air hose with his knife, releasing 100 pounds of pressure and blowing so much ash around the boiler that the men could barely see. Production was stopped for about twenty minutes while the hose was repaired. Although foreman Forrest Fields was aware of this incident, and suspected that Doyle was responsible because of teasing and kidding by co-workers, the only "investigation" he conducted consisted of asking Doyle directly if he had done it. When Doyle predictably denied the act, Fields "just took him at his word" and gave the matter no further thought; he never discussed it with Elkins, Ralston, or anyone else in management.

Doyle received no discipline at the time. It was not until July 13, 1983, five days before the Commission hearing on Mr. Prather's discharge, and over two years after the fact, that the Company placed Doyle on indefinite suspension after counsel for the Company received a signed statement pursuant to formal discovery in which Doyle detailed this incident. Doyle was subsequently reinstated at Stuart Station. Clearly, the investigation and discipline surrounding the Doyle incident is disparate to that imposed on Mr. Prather.

In response to all of this evidence of direct racial animus and disparate treatment, the Company tried to argue that two White employees were allegedly discharged for acts "similar" to those of Mr. Prather. These incidents are clearly not comparable. The first involved a White foreman named Phil Dunn, who engaged in a heated argument with a union-eligible employee. During the argument, Dunn ordered the other employee to get out of his chair; when the employee

refused, Dunn jerked the chair out from under him. This actual battery by a representative of management upon a union-eligible employee goes beyond the purview of joking and horseplay, and is clearly not comparable to merely poking a hole in a hose. Station Manager Ralston himself admitted that the incident "could have caused very serious bodily harm", and that this was not mere horseplay among employees.

The second incident involved two employees named Partridge and Winters, who engaged in an argument at a different Station of DP&L. During that argument, Partridge became so incensed that he kicked the glass out of the door of a coal barge unloader in order to attack Winters. Again, this incident involved an immediate threat of serious physical harm to another employee, and damaged an expensive and technical piece of equipment. Moreover, despite the serious nature of these offenses, and despite an unsatisfactory work rating in September 1978, Partridge was permitted to resign and the Company expunged his record.

Sam Prather, a Black man, received no such preferential treatment, even though his work record was superior to Partridge's.

SUMMARY OF ARGUMENT

As outlined earlier, this Court should deny the instant Petition. There is no "federal question" presented for review, simply a state court decision affirming a state commission's finding of discrimination on the facts before it, in accordance with well-established legal principles. The state court has logically held that case law interpreting Title VII is "generally applicable" to cases arising under the Ohio civil rights laws, given the similarities between those two statutory schemes; thus, Ohio courts may look to federal law for guidance in deciding cases brought pursuant to Ohio Revised Code Chapter 4112. Nevertheless, this is still an action brought solely as a state cause of action pursuant to state law, with remedies prescribed by state law. Accordingly, the state court has not decided any "federal question" here, and none is presented for this Court's review.

Proceeding to the merits of this case, the paramount issue before the Supreme Court of Ohio was whether there is reliable, probative and substantial evidence on the record to support the Commission's finding that Samuel Prather's race was a factor in his termination by Petitioner in September of 1982. This evidence includes statements by supervisory personnel exhibiting overt racial hostility toward Mr. Prather, and evidence establishing that Mr. Prather was then subject to disparate treatment in being reported by those racists for engaging in a single act of horseplay, while numerous White employees who committed similar acts were never reported or disciplined. Mr. Prather was then terminated based solely upon those reports. Given these facts, as found by the Ohio Civil Rights Commission and affirmed by the Supreme Court of Ohio, controlling legal authority

mandates that Petitioner is liable for the blatantly discriminatory actions of those supervisory employees which directly caused Mr. Prather's termination.

Petitioner attempts to change the facts of this case and the governing legal principles herein by asserting that there were simply "racial comments" made by supervisors to Mr. Prather, which were not connected in any way to his discharge. This assertion is patently absurd. The evidence shows that three racist supervisors discriminatorily reported Mr. Prather for a single act of horseplay and recommended his termination, while Whites were never reported or disciplined for similar acts. Then, based solely on those reports and recommendations, Mr. Prather was in fact terminated. Thus, there is unquestionably a clear "nexus" between the racism of Petitioner's supervisors and the resulting discharge of Samuel Prather, and applicable legal precedent mandates that Petitioner be held liable for that discharge.

Given the above facts and legal principles, it is disturbing that Petitioner chooses to cite cases before the Supreme Court of the United States which are not only irrelevant, but which have never been cited at any previous stage of this proceeding. Cases such as *Erebia*, *Howard* and *Levine* (cited in Petition, pp. 10-11), are inapplicable on their facts, as they deal solely with "hostile work environments." Conversely, the instant case reveals that Samuel Prather's racist supervision actively perpetrated a tangible job detriment upon him, by discriminatorily engineering his termination from the Company.

Petitioner's only other defense is that it could not have discriminated against Samuel Prather because it was unaware of the entire panoply of horseplay being

committed by White employees and supervisors throughout the plant. This excuse was dismissed as not credible at the earliest stages of this case, and that factual determination has been upheld by the Supreme Court of Ohio as based upon reliable, probative and substantial evidence on the record. The Supreme Court of the United States is not the place for Petitioner to now attempt to retry the facts of this matter for the fifth time.

Based upon the facts established by the trier-of-fact herein, as affirmed by the Supreme Court of Ohio, and based upon the controlling legal precedent set forth fully below, the Ohio Civil Rights Commission urges the Supreme Court of the United States to deny the instant Petition, and to thereby remedy, once and for all, the grave injustice perpetrated against Samuel Prather.

REASONS FOR DENYING THE WRIT

I. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code §4112.02(A), as affirmed by the Supreme Court of Ohio, and there is no federal question involved, there is no reason for the Supreme Court of the United States to review the state court's decision.

Ohio Revised Code §4112.06(E) mandates, with respect to judicial review of a Final Order of the Ohio Civil Rights Commission, that:

> **(E) The findings of the Commission as to the facts shall be conclusive if supported by reliable,** probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

The Supreme Court of Ohio has endorsed this standard. *Plumbers and Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission, et al.* (1981), 66 Ohio St. 2d 192, 196.

In the instant case, the Commission's findings of fact are supported by reliable, probative and substantial evidence on the record, and solidly support the Commission's ultimate finding that the Company unlawfully discharged Samuel Prather in violation of Ohio Revised Code §4112.02(A). That section provides that it shall be an unlawful discriminatory practice:

> **For any employer, because of the race . . . of any** person, to . . . discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment.

The Commission established a *prima facie* case of unlawful discriminatory discharge based upon race by demonstrating that: (1) Mr. Prather is Black; (2) he was discharged; and (3) White employees were retained, or not even disciplined, despite engaging in conduct similar to that which resulted in Mr. Prather's discharge. *McDonnell-Douglas Corp. v. Green* (1973), 411 U.S. 792, 803.

Evidence establishes that Mr. Prather was subject to disparate treatment, in being reported and terminated for engaging in a single act of horseplay, whereas White employees and supervisors had no discipline imposed when they routinely committed acts such as dumping water on each other, breaking Company hardhats, gluing and welding lockers shut, wrestling and grabbing each other's testicles, and even firing a handgun on the premises. Yet when Sam Prather, a Black man, simply poked a hole in a hose at others' urging, he was terminated.

The incident involving Danny Doyle in April of 1982 stands out as an example of disparate treatment. Both Doyle and Prather engaged in the act of cutting a hose, which shut down their respective operations for the same amount of time. Yet, while Prather was discharged as a result of investigation reports filed by admittedly racist supervision, the "investigation" of the Doyle incident consisted only of one cursory question posed to Mr. Doyle. No discipline was imposed upon Doyle until immediately before the Commission hearing in this matter, nearly two years after the act, and even then Mr. Doyle was not discharged; rather, he was placed on indefinite suspension, and subsequently reinstated by the Company.

Despite this overwhelming evidence of disparate treatment of Mr. Prather, Petitioner argues that it should not be held liable because it was simply unaware of these other acts or the identities of the perpetrators. However, this assertion is contradicted by direct evidence in the record, and ignores the legitimate evidentiary inferences and credibility determinations made by the Ohio Civil Rights Commission as the trier-of-fact.

For example, with regard to the panoply of horseplay and destruction of Company property outlined above, evidence establishes that foremen Mason and Hackathorn themselves were aware of, and participated in, many of these incidents, but had never written up any employee for such acts. Furthermore, employee John Feurt reported the damage to his locker to management, but no disciplinary action was taken.

In addition, there were two other incidents of horseplay of which management was certainly well aware, but took no action. First, there was the incident involving Danny Doyle. Foreman Forrest Fields was not only aware of the incident, but had strong reason to suspect that Doyle was the perpetrator because of teasing and kidding by co-workers. However, Fields' only "investigation" of the matter was to ask Doyle himself if he had done it. When Doyle denied the deed, the matter was closed. Moreover, on September 12, 1982, there was a hose-cutting incident immediately prior to the one committed by Sam Prather of which Hackathorn was aware, yet there is no evidence of any investigation regarding that first incident.

Thus, contrary to Petitioner's argument, many incidents involving Whites were reported to management, and several of the incidents actually

involved management. Indeed, Petitioner's argument makes a mockery of common sense. It is simply not reasonable or credible for the Company to argue that in the midst of water hoses being cut, men wrestling around, hardhats and lockers being destroyed, and handguns being discharged, that none of the supervisory personnel were aware of these incidents or able to conduct an investigation—if they had so desired—which would lead to the identity of the perpetrators.

As noted by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981), "evidence and inferences properly drawn therefrom may be considered by the trier-of-fact on the issue of whether the defendant's explanation is pretextual". *Burdine* at L. Ed. 2d 216, note 10 (9b). This is precisely what the Commission did in the instant case. The Commission properly drew inferences based on the evidence before it which support the conclusion that the Company's supervisory personnel were aware of these routine incidents, and that they simply chose not to take any action. When Petitioner's own supervisory personnel are so lackadaisical in investigating and disciplining incidents involving White employees, Petitioner cannot use that fact to insulate itself from liability when those same supervisors discriminatorily engineer the termination of a Black employee. In fact, such an approach would permit employers to vest lower-level supervisory personnel with full discretion to selectively enforce alleged work rules and discriminate in their disciplinary reports of employees, thereby achieving discriminatory discipline while claiming ignorance of all such abuse. This Court cannot permit such emasculation of our anti-discrimination laws.

Petitioner also attempts to argue that two White employees, Dunn and Partridge, were allegedly discharged for acts similar to those of Samuel Prather. However, as outlined earlier, the actions engaged in by these two men were far more serious than Sam Prather's prank of hose-cutting. The Dunn incident involved a representative of management committing a battery on a union-eligible employee, with an admitted possibility of "very serious bodily harm". The Partridge incident likewise involved an attempted attack on another employee, through smashing a glass door on an expensive and technical piece of machinery. Furthermore, Partridge was given the opportunity to resign with his work record expunged despite his probationary history. Clearly, neither of these incidents can reasonably be characterized as the same kind of "horseplay" engaged in by Mr. Prather, and neither establish any comparable treatment of White employees for behavior similar to that which Mr. Prather engaged in.

The Supreme Court of Ohio, following "a thorough review of the record" herein, held that "reliable, probative and substantial evidence (supports) the findings and orders of the commission and the trial court." By thereby rejecting the Company's baseless arguments, the Court properly gave "due deference to the (Commission's) resolution of evidentiary conflicts" in this matter. *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St. 3d 279; *University of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108.

II. Where racist supervisory personnel make racially-motivated reports and recommendations to an employer regarding a Black employee, and the employer's reliance on those reports and recommendations constitutes the sole basis for the resulting discharge of that employee, and the Supreme Court of Ohio holds the employer liable for that discriminatory discharge as violative of Ohio Revised Code §4112.02(A) in accordance with well-established legal principles, there is no reason for the Supreme Court of the United States to review that decision.

Despite the considerable evidence of disparate treatment set forth above, Petitioner argues that it should not be held liable because there is no "nexus" between the racial animus exhibited by the three supervisory personnel whose reports and recommendations formed the basis for Mr. Prather's termination, and the termination itself. This argument is fallacious as a matter of law.

The "chain of command" underlying Mr. Prather's discharge has been clearly established. The two men who "reported" Mr. Prather for cutting the hose, Mason and Hackathorn, are both racists. Mason frequently referred to Mr. Prather as "a lazy Black bastard", and after Prather's termination stated that he was glad to be "rid of that lazy fuckin' nigger!" Mason also told Prather shortly before his discharge that he wanted to "walk (his) fat Black ass to the gate!" Likewise, Hackathorn is an admitted racist who told Prather two days before he was fired that "your day is comin' soon!"

The reports of these two men—neither of whom had ever reported any other employee for similar acts of horseplay—then formed the basis for Elkins' report to

Ralston, recommending Mr. Prather's dismissal. Elkins generalized that Prather had a "basic flaw in character [which was] not trainable", thereby revealing a racist, stereotyped view of Prather. Elkins himself then signed Prather's termination notice, not Ralston. Ralston never conducted any independent investigation of the incident, instead fully relying on the reports and recommendations of Mason, Hackathorn and Elkins.

It is thus apparent that Mr. Prather's discharge was a direct result of the blatant racism of those three men, and well-established legal principles mandate that Petitioner must be held liable for Mr. Prather's discharge which was based solely upon the racially-motivated reports and recommendations of those supervisors.

In *Weatherspoon v. Andrews and Co.* (1983), 32 F.E.P. 1226 (D.C. Colo.), an overtly racist supervisor had made a determinative discharge recommendation. The company attempted to argue that it should not be held liable because the ultimate decision had been made by a more senior employee who had not been shown to be a racist. The Court definitively dismissed that argument, noting that the ultimate decision-maker had no opportunity to scrutinize the employee's work, and that the decision-maker relied on the accusations of the racist supervisor. Based on these facts, the Court found that the termination was tainted with racial animus, and was thus wrongful.

Similarly, in *Mitchell v. Keith* (1985), 752 F.2d 385, 36 F.E.P. 1443 (9th Cir.), and *Montgomery v. Campbell Soup Co.* (1986), 647 F. Supp. 1372, 42 F.E.P. 721 (N.D. Ill.), the employers argued that they should not be held liable for the discharges of Black employees because they had a good faith reliance on, or honest belief in, reports and recommendations submitted by lower-level supervisors, even though those reports may have been

racially motivated. In each case, however, the court held that where a supervisor's report and recommendation were racially motivated, the employer may be held liable under the doctrine of *respondeat superior;* and once the employer bases an employment decision on such a racially motivated report, the corporate decision becomes tainted by discrimination.

These cases are based upon the very reasoning articulated by this Court in *Meritor Savings Bank v. Vinson* (1986), 477 U.S. _____, 106 S. Ct. 2399, 40 F.E.P. 1822, *J.* Marshall, concurring:

> An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity. The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.
>
> The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer. Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the

> supervisor had actual authority to act as he did. E.g., Flowers v. Crouch-Walker Corp., 552 F. 2d 1277, 1282, 14 FEP Cases 1265, 1268 (CA7, 1977); Young v. Southwestern Savings and Loan Assn., 509 F.2d 140, 10 FEP Cases 522 (CA5 1975); Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 4 FEP Cases 987 (CA6 1972).

40 F.E.P. Cases at 1830. (Footnotes and citations omitted). *See, also, Jeppsen v. Wunnicke* (1985), 611 F. Supp. 78, 37 F.E.P. 994 (D.C. Alaska); ***Ponton v. Newport News School Board, et al.*** (1986), 42 F.E.P. 83 (E.D. Va.).

A cogent analysis of the *Meritor* decision is found in *Schroeder v. Schock*, 42 F.E.P. 1112 (D.C. Kan. 1986), where the court held that an employer must be held strictly liable for its discharge of a female employee, where that termination decision was based on a recommendation of the woman's supervisor which was deemed to be in retaliation for her refusal to comply with the supervisor's sexual demands. The court observed that *Meritor* affirmed that we should look to agency principles to determine an employer's liability for the acts of supervisors, particularly in a situation where an actual discharge or other job action has been taken against an employee for unlawful reasons.

See, Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 23 F.E.P. 1569 (5th Cir. 1979); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 11 F.E.P. 449 (10th Cir. 1975); *Newman v. Arco Corp.*, 491 F. Supp. 89, 7 F.E.P. 385 (M.D. Tenn. 1973); *Williams v. TWA*, 660 F.2d 1267, 27 F.E.P. 487, 489-90 (8th Cir. 1981). *See also*, 29 C.F.R. §1604.11(c), fn. 1.[1]

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[1] The cases cited by Petitioner (*Erebia, Howard* and *Levine*) are inapplicable here, as they do not deal with tangible job detriment; they merely address "hostile work environment" claims.

Nevertheless, in an attempt to escape the clear mandate of these significant precedents, Petitioner engages in a strained and misguided analysis of case law. For instance, Petitioner argues that some of the Commission's cited cases are inapplicable to the instant case because of the "primary distinguishing fact" that the reports which Mason and Hackathorn submitted at the outset of the "investigation" into Prather's termination were "objectively true", whereas in some of the cited cases the reports submitted were not factual. This allegedly "primary distinguishing fact" has absolutely no relevance to the legal issue of an employer's liability for the discriminatory actions of its supervisory personnel.

The issue in this case has never been whether Samuel Prather cut a hose. Prather admitted at an arbitration hearing regarding his discharge, well before the Commission's hearing on the issue of discrimination, that he cut a hose on September 12, 1982. However, the issue in this employment discrimination action goes much deeper than the mere "objective truth" of the reports submitted by Mason and Hackathorn. The issue here is whether *White employees*, when they engaged in acts *similar* to those of Sam Prather, were *reported* to management and received *discipline* similar to that imposed on Sam Prather. The answer to that question, based upon all of the evidence reviewed earlier, is clearly "*No*". The question of unlawful racial discrimination *does not* simply examine an alleged "just cause" for discipline, whether it be a violation of a printed work rule or some other articulated reason. Rather, a *discrimination action* focuses on whether an employee in a *protected class* who admittedly engaged in *certain activity* has been treated the *same as other employees* who engaged in *similar activity*.

The illogic of Petitioner's argument is clear on the facts of this case. Despite an alleged work rule against the destruction of company property, every time White employees perpetrated such horseplay, supervisory personnel made no significant investigation and just "let boys be boys". Conversely, when two blatantly racist supervisors see a Black employee take part in a similar act of horseplay, they immediately submit "objectively true" reports about the incident. These reports lead directly to a recommendation by a middle-level supervisor that the Black employee be terminated because of a "basic flaw in character [which is] not trainable", which in turn causes the Station Manager to terminate the Black employee. The Station Manager conducts no independent investigation, and does not even sign the termination notice. In short, on the facts of this case, the Company would be permitted to delegate disciplinary decisions to lower and middle-level supervisory personnel, who could then selectively and discriminatorily enforce alleged Company policies or work rules, yet the Company could never be held liable for those actions. Such a result, as Petitioner would have this Court endorse, has no justification in logic, justice, or law.

The fallacy of Petitioner's argument is clearly illustrated by examining the decision in *Abasiekong v. City of Shelby*, 744 F.2d 1055 (4th Cir. 1984). In that case, evidence showed that a Black employee had used the services of several City employees for his own personal gain. Despite this evidence of improper behavior on the part of the plaintiff, evidence revealed that numerous White City employees had also used City vehicles, City personnel, or City property for their

personal use. However, "none of the White employees were disciplined or otherwise visited with sanctions because of those activities". 744 F.2d at 1057. Therefore, the Fourth Circuit held the City liable for the discriminatory actions of its overtly racist supervisory personnel in terminating Abasiekong:

> In contrast to the treatment dealt Abasiekong, it appears that several White City employees enjoyed with complete impunity and some regularity the use of City vehicles and resources for personal activities. Here is the crux of our decision favoring Abasiekong. Had no disparate treatment favoring Whites been established, the impropriety of diversion of public property to private use and enjoyment would doubtless have justified the termination of Abasiekong's employment. *See, McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976) (Court acknowledges that a claim of racial discrimination may be maintained by Whites who allege that they were fired for misappropriating employer's property, while a Black employee similarly charged was not dismissed). . . .

744 F.2d at 1057.

Likewise, in the instant case Petitioner stated that it had a policy against horseplay or destruction of Company property, yet the evidence showed that numerous White employees routinely violated that alleged policy and suffered no discipline or other sanctions because of their activities. On the other hand,

Samuel Prather, a Black man, was terminated for a similar act. This constitutes unlawful disparate treatment and discrimination as a matter of law.[2]

Finally, the Commission notes the decision in *Grubb v. W. A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486 (6th Cir. 1984), 759 F.2d 546 (6th Cir. 1985), *cert. den.*, _____ U.S. _____, 106 S. Ct. 342 (1985). In *Grubb*, the Sixth Circuit deferred to the factual determinations made by the District Court as trier-of-fact, and upheld the District Court's judgment finding the employer liable for the discriminatory actions of its supervisory personnel on facts not nearly as compelling as those on the record here. Likewise, the factual determinations and finding of unlawful discrimination by the Commission here should be upheld based upon reliable, probative, and substantial evidence on the record.

With reference to the remainder of Petitioner's arguments, Petitioner curiously argues that *Montgomery v. Campbell Soup Company*, 647 F. Supp. 1372, 42 F.E.P. 721 (N.D. Ill. 1986), is not applicable here because the *Montgomery* court did not actually hold in favor of the Plaintiff based on the facts in that case. However, that does not alter the *Montgomery* court's clearly stated proposition that if the employer considers racially-motivated reports of supervisors in its decision to

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[2] The facts of this case are also similar to those in *Mitchell v. Keith*, *supra*, where the supervisor essentially tricked the employee into violating a work rule, then reported him for that violation. In our case, supervisory personnel had long-established that acts of horseplay would not be subject to investigation or discipline; however, as soon as Samuel Prather was convinced to participate in one such prank, his racist supervision engineered his termination from the Company.

terminate a Black employee, "the corporate decision becomes tainted by discrimination". *Montgomery* at 42 F.E.P. 725.[3]

The Commission also fails to see the point of Petitioner's argument regarding the Supreme Court's decision in *Meritor Savings Bank v. Vinson* (1986), 477 U.S. _____, 106 S. Ct. 2399, 40 F.E.P. 1822. Petitioner observes that the *Meritor* Court did not apply a "strict liability" standard in assessing the employer's liability in that "hostile environment" sexual harassment case. While this may be true, it has nothing to do with the issue of whether the Company should be held liable for the discriminatory termination of Samuel Prather. This issue is clearly addressed in Justice Marshall's concurrence in *Meritor*, in which four Justices joined. The concurrence explicitly reached the same conclusion already espoused by numerous Courts of Appeals, that where the discrimination actually results in "tangible job detriment" to the employee, the employer will automatically be held liable for the discriminatory actions of its supervisory personnel. (Please see the *Meritor* concurrence for an extensive listing of such cases). Similarly, while the majority of the Court in *Meritor* "declined the parties' invitation to issue a definitive rule on employer liability" in that "hostile environment" case, the majority nonetheless held that

[3] The Commission urges this Court to note that the Company in *Montgomery* tried to rely upon two of the same cases which Petitioner relies upon, *DeHorney v. Bank of America*, 39 F.E.P. 723 (9th Cir. 1985), and *Arna v. Northwestern University*, 640 F. Supp. 923, 41 F.E.P. 647 (N.D. Ill. 1986). The *Montgomery* Court distinguished each of those cases, and held them inapplicable to the facts before it; for identical reasons, both *DeHorney* and *Arna* are inapplicable to the instant facts. See *Montgomery* at 42 F.E.P. 725.

"we do agree with the EEOC that Congress wanted Courts to look to agency principles for guidance in this area." 40 F.E.P. at 1829.

Petitioner also argues that *quid pro quo* sexual harassment cases, such as *Schroeder v. Schock*, 42 F.E.P. 1112 (D.C. Kan. 1986), which deal with a tangible job detriment to an employee as a result of a supervisor's discriminatory actions, have not been applied to "cases with facts similar to the present case". There is no reason in logic or law why those holdings could not, or should not, be applied here. As those cases and all others previously cited illustrate, an employer must be held liable for the discriminatory actions of its supervisory personnel which result in a tangible job detriment to another employee.

In fact, Petitioner concedes this very point at page 15 of its Petition, by acknowledging that an employer "may be held liable for the discriminatory actions of its supervisors which affect the tangible job benefits of an employee on the basis of race." (Citing *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). With this acknowledgment, the issue in this case is simply focused upon the proof of discrimination discussed earlier, i.e., the evidence of racial hostility and disparate treatment on the record herein. When the facts of this case are compared with the facts in *Weatherspoon, Abasiekong*, and the other cases cited above, it is clear that the Commission's finding of unlawful discrimination is supported by reliable, probative and substantial evidence on the record.

CONCLUSION

Based upon the foregoing analysis of the facts on the record and the controlling legal principles applicable herein, the Ohio Civil Rights Commission respectfully urges this Court to deny the instant Petition. As set forth in the Decision of the Supreme Court of Ohio, reliable, probative and substantial evidence on the record supports the Commission's finding that Samuel Prather was subject to disparate treatment, and that such disparate treatment was the result of intentional discrimination at the hands of the Company's overtly racist supervisory personnel. Once those facts have been established, Petitioner must be held liable as a matter of law for Mr. Prather's termination, which was directly attributable to the racially-motivated reports and recommendations of those supervisory personnel.

Contrary to Petitioner's misguided arguments, this case does not involve "strict liability", nor does it involve a situation where isolated "comments" were made to a Black employee. The Commission determined, and the Supreme Court of Ohio affirmed, that the racial hostility of the supervisory personnel motivated them to selectively and discriminatorily report the actions of Sam Prather, and that based solely on those reports and recommendations, Mr. Prather was terminated. Thus, the "nexus" between that racism and the termination has been clearly established on the record herein.

Likewise, it is disingenuous for Petitioner to claim that it was without knowledge of any of the incidents of horseplay committed by White employees and supervisors. That excuse was deemed not credible by the trier-of-fact based upon the entire record, and that

factual determination has been affirmed by the Supreme Court of Ohio. Petitioner now is attempting to re-try this case for a fifth time, and that attempt must be rejected by this Court.

Accordingly, the Ohio Civil Rights Commission urges the Supreme Court of the United States to deny the instant Petition, and thereby uphold the decisions of the Supreme Court of Ohio and the Commission herein.

Respectfully submitted,

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